

<b>GEORGE E. MOODY</b>	)	
Claimant	)	
VS.	)	
	)	Docket No. 239,624
<b>MARVIN SMITH and GLENN COMBS</b>	)	
Respondents	)	
AND	)	
	)	
<b>INSURANCE COMPANIES UNKNOWN</b>	)	
Insurance Carriers	)	
AND	)	
	)	
<b>KANSAS WORKERS COMPENSATION FUND</b>	)	

Claimant appeals the May 10, 2000, Order of Administrative Law Judge Jon L. Frobish. The Order dismissed claimant's claim, finding that respondent had a total gross payroll of less than \$20,000 and, pursuant to K.S.A. 1998 Supp. 44-505(a), the Workers Compensation Act does not apply.

- (1) Did respondent have or anticipate having an annual gross payroll of \$20,000 either during the current (date of accident) calendar year or for the calendar year preceding the date of accident?
- (2) Did the Administrative Law Judge, as a matter of law, exceed his jurisdiction in granting the Workers Compensation Fund's motion for additional time for discovery after granting claimant's motion to add the Workers Compensation Fund as a party to the action?

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Based upon the evidence presented, the Appeals Board finds as follows:

This matter originally came before Administrative Law Judge Bruce E. Moore in May 1999 for a preliminary hearing. At that time, the Administrative Law Judge advised the parties that a potential conflict of interest existed, as he had been the prosecuting attorney for Saline County and had prosecuted claimant on several prior complaints. Claimant requested the Administrative Law Judge recuse himself from this matter, which he did. It was transferred to Administrative Law Judge Jon L. Frobish in Wichita, Kansas.

The matter went before Judge Frobish on a preliminary hearing held September 2, 1999. At that preliminary hearing, claimant and respondent, Glenn Combs, appeared in person and by counsel. Respondent, Marvin Smith, appeared by counsel, but did not appear in person and was unavailable to testify. Counsel advised the Administrative Law Judge that respondent Smith had transportation problems. The transfer from Judge Moore to Judge Frobish had resulted in the hearing being moved from Salina to Wichita, which prohibited respondent Smith from appearing.

At the conclusion of that record, Judge Frobish advised that he desired the testimony of Mr. Smith be presented in the court's presence. Judge Frobish even offered to hold the hearing in Salina if it would make it more convenient for Mr. Smith to testify in person. Following that preliminary hearing, Judge Frobish issued an order, granting claimant temporary total disability compensation beginning October 19, 1998, through November 10, 1998, ordering outstanding medical incurred to date paid as authorized medical treatment and further ordered the respondent to provide claimant with a list of three physicians from which claimant was to choose one for treatment. The Administrative Law Judge dismissed respondent, Glenn Combs, and the Workers Compensation Fund without prejudice. That order was not appealed by any party.

For unknown reasons, the benefits ordered were never provided. Although claimant did receive substantial medical treatment, it is unclear from the record who, if anyone, paid for that medical care. It did not come from respondent, Marvin Smith.

Additionally, the testimony of Marvin Smith was not scheduled as had been Judge Frobish's desire.

Claimant issued a demand for compensation directed to Scott M. Price, the attorney for Marvin Smith, and also to Marvin Smith. The copy, which was sent to Mr. Smith, was returned to claimant's attorney, unclaimed.

On March 8, 2000, claimant filed a motion requesting that the court rejoin the Workers Compensation Fund as a party to the action, as the evidence indicated respondent, Marvin Smith, was unable or unwilling to provide the benefits which had been earlier ordered.

The motion hearing was held March 30, 2000. At that time, the court was advised that Mr. Smith was unable to pay any monies whatsoever and, at the time of the hearing, was living in his van, having no other residence.

The Fund requested the opportunity to depose Mr. Smith in order to ascertain whether Mr. Smith met the requirements of K.S.A. 1998 Supp. 44-505 for both the preceding and current year of the alleged accident, which requires that respondent have a gross annual payroll of over \$20,000 for the year. The Administrative Law Judge allowed the Fund 30 days to locate and depose Mr. Smith. The court dropped its earlier request that Mr. Smith's testimony be taken in the court's presence. The Fund did depose Mr. Smith on April 17, 2000, in Salina, Kansas.

Mr. Smith testified to being a semi-retired, self-employed concrete contractor. He had not, however, done concrete work for many years. His current source of income included a monthly benefit from Social Security in the amount of \$567, out of which \$50 per month was deducted for Medicare, and an additional \$275 a month that he was receiving from the contract sale of his house. Mr. Smith also testified that at no time since his retirement in 1992 had he had a payroll of more than \$2,000 to \$5,000 per year. He testified that most of the work that he performed was done on a contract basis and he paid cash to any workers who would have contracted with him. He testified that he would not have paid more than \$2,000 to \$5,000 total contract payments during any year between 1992 and his deposition.

However, the Administrative Law Judge did conclude that respondent Smith did not meet the requirements of K.S.A. 1998 Supp. 44-505(a) in that his total gross annual payroll was less than \$20,000. After reviewing the evidence, the Board agrees. Mr. Smith, at no time, had income sufficient to generate a payroll of \$20,000 or more per year. Mr. Smith's testimony was that, at most, he would have paid approximately \$2,000 to \$5,000 per year or less in total contract payments to the workers he utilized on his various odd jobs. There is no evidence in the record to contradict Mr. Smith's testimony. The Appeals Board, therefore, finds that the Order by the Administrative Law Judge, dismissing this matter and finding that the Workers Compensation Act does not apply to the arrangement between claimant, George E. Moody, and respondent, Marvin Smith, should be affirmed.

These findings render Issue No. 2 moot.

There was a substantial dispute regarding whether claimant was an employee of Marvin Smith or simply a volunteer or independent contractor. That issue was not

addressed by the Administrative Law Judge in his May 10, 2000, Order, and will not be addressed by the Board at this time.

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Jon L. Frobish dated May 10, 2000, should be, and is hereby, affirmed, and the claim of claimant, George E. Moody, against respondent, Marvin Smith, and the Kansas Workers Compensation Fund should be, and is hereby, dismissed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of June 2000.

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BOARD MEMBER

c: Randy S. Stalcup, Wichita, KS  
Scott M. Price, Salina, KS  
Jeffrey E. King, Salina, KS  
Jon L. Frobish, Administrative Law Judge  
Philip S. Harness, Director